LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
DEC 18 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-78

MEL KAHN, etc.,

Appellants,

—v.—

ROBERT L. SHEVIN, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR APPELLANTS

RUTH BADER GINSBURG
MELVIN L. WULF
BRENDA FEIGEN FASTEAU
CHRISTINE CASSADAY CURTIS
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

WILLIAM HOPPE
Second Floor, Concord Building
Miami, Florida 33130

Attorneys for Appellants

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Question Presented	3
Statement of the Case	3
Summary of Argument	4
ARGUMENT:	
I. The gender-based classification in Fla. Stat. §196.191(7), established for a purpose unrelated to any biological difference between the sexes, constitutes an invidious discrimination in violation of the equal protection clause of the fourteenth amendment	5
A. The Challenged Classification Is Based on a Stereotype That Lacks Correspondence With Reality for Millions of Families in the United States	5
B. The Equal Protection Clause of the Fourteenth Amendment Does Not Tolerate Legislative Line-Drawing on the Basis of Sex Stereotypes	8

PAGE

C. Gender Classification as a Proxy for Some Other Individual or Social Characteristic, Such as Physical or Economic Capability or Need, Once Regarded as Favorable to or Protective of Women Is Now Recognized as Ultimately Harmful to Them 16

II. Upon determining that the gender-based classification in Fla. Stat. §196.191(7) violates the fourteenth amendment, this Court should remand to the court below for consideration whether, consistent with the dominant legislative purpose, the constitutional infirmity should be remedied by holding the exemption available to all widowed property owners 25

CONCLUSION 31

TABLE OF AUTHORITIES

Cases:

Aiello v. Hanson, 359 F. Supp. 792 (N.D. Calif. 1973), *juris. statement filed sub nom.* Geduldig v. Aiello, 42 U.S.L.W. 3247 (Oct. 12, 1973) 12

Ballard v. Laird, 360 F. Supp. 643 (S.D. Calif. 1973) 12, 13, 28

Bowen v. Hackett, 361 F. Supp. 854 (D.R.I. 1973) 12

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) 8

Bray v. Lee, 337 F. Supp. 934 (D. Mass. 1972) 9

Brenden v. Independent School District, 477 F.2d 1292 (8th Cir. 1973) 9

Burrow v. Kapfhammer, 284 Ky. 753, 145 S.W.2d 1067 (1940), *noted in* 54 Harv. L. Rev. 1078 (1941) 29, 30

PAGE

Cohen v. Chesterfield County School Board and Cleveland Board of Education v. La Fleur, U.S.S.C. Nos. 72-777 and 72-1129, filed October, 1973 11-12
Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968) 18
Commonwealth v. Stauffer, 211 Pa. Super. 113, 251 A.2d 718 (1969) 18

Dandridge v. Williams, 397 U.S. 471 (1970) 10
De Kosenko v. Brandt, 63 Misc.2d 895, 313 N.Y.S.2d 827 (Sup. Ct. 1970) 17
Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir. 1971) 19

Edwards v. Healy, U.S.S.C. Docket No. 73-759 (Dec. 1973) 16
Ellis v. Hathaway, 27 Utah 2d 143, 493 P.2d 985 (1972) 30
Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973) 9

Frontiero v. Richardson, 411 U.S. 677 (1973) ..10, 11, 12, 13, 15, 17, 22, 23, 25, 27, 28, 29

Gates v. Foley, 247 So. 2d 40 (Fla. 1971) 30
Glona v. American Guaranty & Liability Ins. Co., 391 U.S. 73, *reh. den.*, 393 U.S. 898 (1968) 27
Goesaert v. Cleary, 335 U.S. 464 (1948) 8, 23
Goldblatt v. Board of Education, 52 Misc.2d 238, 275 N.Y.S.2d 550 (1966), *aff'd*, 57 Misc.2d 1089, 294 N.Y.S.2d 272 (Sup. Ct. 1968) 17
Gomez v. Perez, 409 U.S. 535 (1973) 27
Graham v. Richardson, 403 U.S. 365 (1971) 27

PAGE

Green v. Waterford Board of Education, 473 F.2d 466 (10th Cir. 1972), *cert. den.*, 412 U.S. 906 (1973) 9, 23
Gruenwald v. Gardner, 390 F.2d 591 (2d Cir.), *cert. den.*, 393 U.S. 982 (1968) 23, 24

Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972) 19, 28
Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973), *juris. statement filed*, 42 U.S.L.W. 3307 (Nov. 12, 1973) 12, 13, 17
Heath v. Westerville Board of Education, 345 F. Supp. 501 (S.D. Ohio 1972) 9
Hoyt v. Florida, 368 U.S. 57 (1961) 8, 16, 17, 23

Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931) 29
In Re Estate of Legatos, 1 Cal. App. 3d 657, 91 Cal. Rptr. 910 (1969) 14, 15, 28
In Re Gault, 387 U.S. 1 (1967) 2

Jefferson v. Hackney, 406 U.S. 535 (1972) 10

La Fleur v. Cleveland Board of Education, 465 F.2d 1185 (6th Cir. 1972), *cert. granted* 411 U.S. 947 (1973) 9
Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972) 9, 14
Levy v. Louisiana, 391 U.S. 68, *reh. den.*, 393 U.S. 898 (1968) 2, 27
Liberti v. York, 28 Conn. Supp. 9, 246 A.2d 106 (1968) 18
Loving v. Virginia, 388 U.S. 1 (1967) 2

PAGE

McGowan v. Maryland, 366 U.S. 420 (1961) 10
Matter of Patricia A., 31 N.Y.3d 83, 335 N.Y.S.2d 33 (1972) 9
Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) .. 8
Moritz v. Commissioner of Internal Revenue, 469 F.2d 466 (10th Cir. 1972), *cert. den.*, 412 U.S. 906 (1973) 13, 14, 15, 28, 29
Muller v. Oregon, 208 U.S. 412 (1908) 8

New Jersey v. Chambers, 36 N.J. 287, 307 A.2d 78 (1973) 18
New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) 27

Quong Ham Wah Co. v. Industrial Accident Comm'n, 184 Cal. 26, 192 P. 1021 (1920), *app. dism.*, 255 U.S. 445 (1921) 29

Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972) 9
Reed v. Reed, 93 Idaho 511, 465 P.2d 635 (1970) 8
Reed v. Reed, 404 U.S. 71 (1971) 8, 9, 10, 17, 23
Richardson v. Davis, 409 U.S. 1069 (1972), *aff'g* 342 F. Supp. 588 (D. Conn. 1972) 27
Richardson v. Griffin, 409 U.S. 1069 (1972), *aff'g* 346 F. Supp. 1226 (D. Md. 1972) 27
Robinson v. Rand, 340 F. Supp. 37 (D. Colo. 1972) 9
Rosen v. Public Service Elec. & Gas Co., 477 F.2d 90 (3rd Cir. 1973) 19

PAGE

Sail'er Inn v. Kirby, 5 Cal. 3d 1, 485 P.2d 529 (1971) 11
Schmoll v. Creecy, 54 N.J. 194, 254 A.2d 525 (1969) 27
Shapiro v. Thompson, 394 U.S. 618 (1969) 14, 27
Shull v. Columbus Municipal Separate School District, 388 F. Supp. 1376 (N.D. Miss. 1972) 9
Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) 26
Smith v. City of East Cleveland, 363 F. Supp. 1131 (N.D. Ohio 1973) 12
Stanley v. Illinois, 405 U.S. 645 (1972) 13, 15, 23

U.S. Dept. of Agriculture v. Moreno, 41 U.S.L.W. 5105 (U.S. June 25, 1973) 27
U.S. ex rel. Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968) 18

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) 10, 27
Welsh v. United States, 398 U.S. 333 (1970) 26
White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) 30
Williams v. San Francisco Unified School District, 340 F. Supp. 438 (N.D. Calif. 1972) 9

Yale & Towne Mfg. Co. v. Travis, 262 F. 576 (S.D.N.Y. 1919), *aff'd*, 252 U.S. 60 (1920) 29

Constitutional Provisions:

Florida Constitution
Article IX, §9 (1885) 2, 7, 8
Article I, §2 (1968) 3
Article VII, §3(b) (1968) 2, 8

United States Constitution
Fourteenth Amendment 3, 4, 5, 8, 25

PAGE

Regulations and Guidelines:

3 C.F.R. §418 (1965), as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1968), at 13 (October 1, 1972) 19
29 C.F.R. §§1604.1–1604.10 18
29 C.F.R. §1604.9(a) 18
29 C.F.R. §1604.9(f) 18
CCH Emp. Practices Guide ¶6050 (June 16, 1969) (EEOC Decisions, Case No. YNY 9-034) 19
H.E.W. Higher Education Guidelines, issued pursuant to Executive Order 11246 ..... 19, 24

Federal Statutes:

1 U.S.C. §1 25
5 U.S.C. §2108 ..... 20, 21
5 U.S.C. §5924 22
5 U.S.C. §7152 20
5 U.S.C. §8101(6) 20
5 U.S.C. §8101(11) 20
5 U.S.C. §8110 20
5 U.S.C. §8133 20
5 U.S.C. §8341 21
28 U.S.C. §1257(2) 2
37 U.S.C. §401 22
38 U.S.C. §102(b) 22, 25
38 U.S.C. §1682 22
42 U.S.C. §414 24
42 U.S.C. §2000e *et seq.* 18
P.L. 91-658, 84 Stat. 1961 21
P.L. 92-187, 85 Stat. 644 ..... 20, 21
P.L. 92-540, 86 Stat. 1074 ..... 22, 25
P.L. 93-64, 87 Stat. 147 22

PAGE

State Statutes:

Fla. Laws 1891, c. 4010, §4(7) 7
Fla. Laws 1895, c. 4322, §4(7) 7
Fla. Stat. §1.01(2) 25
Fla. Stat. §61.08 (1972) 29
Fla. Stat. §192.06(7) (1941), *as noted in* Fla. Laws 1943, c. 21742, §1(7), *amended by* Fla. Laws 1969, c. 69-55, §§1, 2 and *renumbered* Fla. Stat. §196.191 (7) 8
Fla. Stat. §196.191 repealed by Laws 1971, c. 71-133, §15, effective December 31, 1971 2
Fla. Stat. §196.191(7) (1969) *repealed by* Fla. Laws 1971, c. 71-133, §15 and *replaced by* Fla. Stat. §196.-202, Fla. Laws 1971, c. 71-133, §12 ..... 8, 24, 25, 31
Fla. Stat. §196.202 *replacing* §196.191(7), *added by* Laws 1971, c. 71-133, §12, effective December 31, 1971 2

Other Authorities:

Ferriss, Indicators of Trends in the Status of American Women 103 (1971) 7
Galbraith, Kuh and Thurow, *The Galbraith Plan to Promote the Minorities*, N.Y. Times, Aug. 22, 1971 (Magazine) at 9 24
Grimke, Letters on the Equality of the Sexes and the Condition of Women; Addressed to Mary Parker, President of the Boston Female Anti-Slavery Society 10 (1838) 16
Gunther, *The Supreme Court, 1971 Term, Forward: A Model for a Never Equal Protection*, 86 Harv. L. Rev. 34 (1972) 9
Note, *Pregnancy Discharges in the Military: The Air Force Experience*, 86 Harv. L. Rev. 568 (1973) 9

PAGE

Johnston & Knapp, *Sex Discrimination by Laws: A Study in Judicial Perspective*, 46 N.Y.U.L. Rev. 675 (1971) 8, 16

N.Y. Times, Mar. 19, 1973, p. 40, col. 1 7

Occupation by Industry, PC-7C 1970 7

Sex Discrimination Guidelines, 29 C.F.R. §§1604.1-1604.10 18

U.S. Bureau of Census, Census of Population: 1970, Detailed Characteristics, Final Report PC(1)-D11 Florida, October, 1972, at 679-80 30

U.S. Bureau of Labor Statistics, Dept. of Labor, Employment and Earnings 34-35 (May 1971) 6

U.S. Women's Bureau, Dept. of Labor, Bull. No. 294, Handbook of Women Workers 39 (1969) 6

U.S. Women's Bureau, Dept. of Labor, Why Women Work 1 (rev. ed. June 1973) 6

Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968) 14

Waldman, *Changes in the Labor Force Activity of Women*, 93 Monthly Labor Rev. 10 (June 1970) 6-7

IN T

Supreme Court of

OCTOBER TE**United States**

No. 7:973

MEL KAH

—v.—,

Appellants,

ROBERT L. SH

et al.,

ON APPEAL FROM THE *Appellees.*

THE STATE C

EME COURT OF

BRIEF FOR ARIDA

LANTS

Opinions

The opinion of the Supreme C**w**
is reported at 273 So.2d 72.
Court, 11th Judicial District, J**of the State of Florida**
reported. Copies of both opi**opinion of the Circuit**
Appendix to the Jurisdictional**County, Florida, is un-**
are set forth in the

Jurisdiement (J.S. at A1-A7).

On February 7, 1973, the S
of Florida entered the judgm
this appeal. Notice of Appea
the United States was filed in t**ne Court of the State**
on May 4, 1973 (A. 17a). The **hich is the subject of**
the Supreme Court of
preme Court of Florida
lictional Statement was

filed on July 6, 1973, and probable jurisdiction was noted on October 23, 1973.

The jurisdiction of the Supreme Court to review this decision of the Supreme Court of Florida on appeal is conferred by Title 28 U.S.C., Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *In re Gault*, 387 U.S. 1 (1967); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Levy* v. *Louisiana*, 391 U.S. 68 (1968).

Statutes Involved

Florida Statute §196.191(7) provides:[1]

[1] Fla. Stat. §196.191 was repealed by Laws 1971, c. 71-133, §15, effective December 31, 1971. Section 196.202, replacing §196.191 (7), was added by Laws 1971, c. 71-133, §12, effective December 31, 1971. Section 196.202 reads:

> 196.202 Property of widows, blind persons, and persons totally and permanently disabled
>
> Property to the value of five hundred dollars ($500) of every widow, blind person, or totally and permanently disabled person who is a bona fide resident of this state shall be exempt from taxation.

The Florida Constitution sets forth the basis for this property tax exemption:

Article IX, Section 9 of the 1885 Florida Constitution provided:

> . . . [T]here shall be exempt from taxation property to the value of five hundred dollars to every widow *and* to every person who is a bona fide resident of this state, and has lost a limb or been disabled in war or misfortune.

The provisions of former Article IX, Section 9 of the 1885 Florida Constitution, were incorporated in its successor, Article VII, Section 3(b) of the 1968 Florida Constitution, which provides:

> There shall be exempt from taxation, cumulatively, to every head of a family residing in this state, household goods and personal effects to the value fixed by general law, not less than one thousand dollars, and to every widow or person who is blind or totally and permanently disabled, property to the value fixed by general law not less than five hundred dollars.

A widow is entitled to exempt $500 yearly from her property tax. Other persons entitled to exempt $500 include: those who have lost a limb or become disabled in war, by military hostilities or by misfortune and are residents of the state.

Question Presented

Whether Fla. Stat. §196.191(7), which provides that widows are entitled to a property tax exemption of up to $500, but makes no provision for men similarly situated, denies appellant, a widower, the equal protection of the laws.

Statement of the Case

Appellant Mel Kahn is a widower who resides in Florida. He applied, in January, 1971, to the Dade County Tax Assessor's office for a $500 property tax exemption under Fla. Stat. §196.191(7). That statute provides a property tax exemption for widows, but does not specify a similar exemption for widowers. Widower Kahn was denied the tax exemption.

Appellant then sought declaratory relief in the Circuit Court for Dade County, Florida; he argued that §196.191(7) is unconstitutional as a violation of the equal protection clause of the fourteenth amendment to the United States Constitution and Art. 1, §2, Declaration of Rights, Florida Constitution, 1968, insofar as widowers are denied the exemption accorded widows. The Circuit Court held that §196.191(7), as it applies to the female gender only, is "discriminatory and arbitrary and unconstitutional" under the equal protection clause of the fourteenth amendment

to the United States Constitution (J.S. at A3). On defendants' appeal, the Supreme Court of Florida reversed, holding §196.191(7) a valid legislative enactment. 273 So. 2d at 74 (J.S. at A7).

Summary of Argument

I.

Fla. Stat. §196.191(7), providing a property tax exemption of up to $500 to all Florida widows, but not widowers, denies appellant the equal protection of the law guaranteed by the fourteenth amendment.

Historically, women have been treated as subordinate and inferior to men. Although discrimination against women persists and equal opportunity has by no means been achieved, women simultaneously have been placed on a pedestal and given special benefits. Both discrimination against, and special benefits for, women stem from stereotypical notions about their proper role in society.

Special benefits for women such as the tax exemption here at issue result in discriminatory treatment of similarly situated men, themselves victims of male sex-role stereotypes. Absent firm constitutional foundation for equal treatment of men and women by the law, individuals seeking to be judged on their own merits will continue to encounter law-sanctioned obstacles.

II.

The distinction between widows and widowers established by Fla. Stat. §196.191(7) creates an "invidious classification" requiring close judicial scrutiny. Although the

legislature may distinguish between individuals on the basis of their need or ability, it is presumptively impermissible to distinguish on the basis of an unalterable identifying trait over which the individual has no control and for which he or she should not be disadvantaged by the law.

III.

Upon finding that the sex-based classification in Fla. Stat. §196.191(7) violates the fourteenth amendment, this Court should remand to the court below for consideration whether, consistent with the dominant legislative purpose, the constitutional infirmity should be remedied by holding the exemption available to all widowed property owners.

ARGUMENT

I.

The gender-based classification in Fla. Stat. §196.191 (7), established for a purpose unrelated to any biological difference between the sexes, constitutes an invidious discrimination in violation of the equal protection clause of the fourteenth amendment.

A. *The Challenged Classification Is Based on a Stereotype That Lacks Correspondence With Reality for Millions of Families in the United States.*

The classification embodied in Fla. Stat. §196.191(7), granting property tax exemptions to widows but not to widowers, reflects a familiar stereotyping of sex roles: a woman left alone by the death of her husband is thought economically disabled; a man is believed to suffer scant financial loss upon the death of his wife, and even to be relieved of the burden of supporting her.

The division of the widowed population into two distinct classes, self sufficient men and disabled women, is hardly tenable in this latter half of the twentieth century. Widowhood may have a devastating impact on a man whose age disqualifies him from pursuing economic opportunities, and who must cope with loss of myriad services once performed for him by his spouse. On the other hand, many women, during marriage, are self supporting and may contribute importantly to the support of their families. Hardly atypical is the older couple with a wife in good health who assumes financial responsibility for an ailing husband. Moreover, widowed women do not constitute a clear economic class. On the contrary, the Florida population undoubtedly includes a substantial number of affluent widows who need a tax exemption far less than widowers of limited means.

In short, Fla. Stat. §196.191(7) reflects a stereotypical view of the economic roles of men and women which does not correspond with reality for millions of persons in the United States. In April, 1971, approximately 32 million women, 42.7% of all women 16 years of age or older, were in the labor force, compared with 28.9% in March, 1940. U.S. Bureau of Labor Statistics, Dept. of Labor, Employment and Earnings 34-35 (May 1971). By 1973, more than 33 million women were in the labor force; of these women, 19.25 million, or 58.5% of working women, were married and living with their husbands. U.S. Women's Bureau, Dept. of Labor, Why Women Work 1 (rev. ed. June 1973). This is almost twice the rate of 1940. U.S. Women's Bureau, Dept. of Labor, Bull. No. 294, Handbook of Women Workers 39 (1969). From 1960 to 1970, nearly half of the increase in the labor force was accounted for by married women. Waldman, *Changes in the Labor Force Activity of Women,* 93

Monthly Labor Rev. 10, 11 (June 1970). And in recent years, married women have made up the largest portion of the annual increase in the civilian labor force. Waldman & Young, *Marital and Family Characteristics of Workers*, 94 Monthly Labor Rev. 46 (March 1971). Married women of all ages are increasing their rate of labor force participation while other groups are not. A. Ferriss, Indicators of Trends in the Status of American Women 103 (1971). In well over 40% of families where both spouses were present, both were employed. *Id.* at 95.

Moreover, despite the discrimination against women workers still characteristic of the labor market, many married women earn more than their husbands. The Census Bureau reports that in 1970, wives earned more than husbands in 3.2 million or 7.4% of American families. *See* N.Y. Times, Mar. 19, 1973, at 40, col. 1. The 1970 Census also reveals that women accounted for two-thirds of the increase in total employment in the 1960's and for half or more of the gain in certain jobs, ranging from bookkeeping to bartending. *See* Occupation by Industry, PC-7C, 1970.

It may be that decades ago Florida's widow's exemption did correlate "fairly and substantially" with the ability of women property owners to pay taxes. In 1892, the exemption was applicable only to the "widow dependent on her own exertions, that has a family dependent upon her for support." [2]

By the turn of the century, the dependent family requirement was dropped, but the exemption remained conditioned on the widow's "dependen[ce] upon her own exertions." [3]

---

[2] Fla. Const. art. IX, §9 (1885); Fla. Laws 1891, c. 4010, §4(7), p. 2.

[3] Fla. Laws 1895, c. 4322, §4(7), p. 4.

Since 1941, the exemption has been available, without qualification, to "every widow."[4]

In light of the significant changes in women's opportunities for and pursuit of gainful employment in the course of this century, the progression from needy widow to any widow, and continued exclusion of widowers, defies rational explanation.

B. *The Equal Protection Clause of the Fourteenth Amendment Does Not Tolerate Legislative Line-Drawing on the Basis of Sex Stereotypes.*

In 1971, this Court, departing from a century old decisional course,[5] declared constitutionally impermissible a classification similar to the one challenged here. In *Reed* v. *Reed*, 404 U.S. 71 (1971), the Court invalidated an Idaho statute that preferred men over women for appointment as estate administrators. The statutory preference was based on the stereotypical assumption that men have more business experience than women. *Reed* v. *Reed*, 93 Idaho 511, 514, 465 P.2d 635, 638 (1970). Explicitly repudiating one-eyed sex role thinking as a predicate for legislative distinctions, this Court held in *Reed:*

---

[4] Constitutional development: Fla. Const., art. IX, §9 (1885), *as amended*, general election 1940 (Amendment of 1940 proposed by Fla. Laws 1939, H.J.R. No. 375, p. 1666); Fla. Const. art. VII, §3 (1968). Statutory development: Fla. Stat. §192.06(7) (1941), *as noted in* Fla. Laws 1943, c. 21742, §1(7), p. 154; *amended by* Fla. Laws 1969, c. 69-55, §§1, 2, p. 240 and *renumbered* Fla. Stat. §196.191(7); Fla. Stat. §196.191(7) (1969) *repealed by* Fla. Laws 1971, c. 71-133, §15, p. 409 and *replaced by* Fla. Stat. §196.202, Fla. Laws 1971, c. 71-133, §12, p. 408.

[5] *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1873); *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162 (1874); *Muller* v. *Oregon*, 208 U.S. 412 (1908); *Goesaert* v. *Cleary*, 335 U.S. 464 (1948); *Hoyt* v. *Florida*, 368 U.S. 57 (1961); *see generally* Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. Rev. 675 (1971).

> [The statute] provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause. 404 U.S. at 75.

Recognizing that the governmental interest urged to support the Idaho statute was "not without some legitimacy," 404 U.S. at 76, the Court nonetheless termed "arbitrary" the major premise of the Idaho court, and found the legislation constitutionally infirm because it provided "dissimilar treatment for men and women who are . . . similarly situated." 404 U.S. at 77.

Reed was assessed by both courts[6] and commentators[7] as a sign of fundamental change in this Court's perspective with regard to gender-based classifications. It was apparent that the Court had departed significantly from the traditional equal protection analysis familiar in review of social and economic legislation. Sex-based distinctions

---

[6] *See Brenden* v. *Independent School District*, 477 F.2d 1292 (8th Cir. 1973); *Eslinger* v. *Thomas*, 476 F.2d 225 (4th Cir. 1973); *Green* v. *Waterford Board of Education*, 473 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973); *La Fleur* v. *Cleveland Board of Education*, 465 F.2d 1185 (6th Cir. 1972), *cert. granted* 411 U.S. 947 (1973); *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972); *Heath* v. *Westerville Board of Education*, 345 F. Supp. 501 (S.D. Ohio 1972); *Reed* v. *Nebraska School Activities Ass'n*, 341 F. Supp. 258 (D. Neb. 1972); *Williams* v. *San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Calif. 1972); *Robinson* v. *Rand*, 340 F. Supp. 37 (D. Colo. 1972); *Shull* v. *Columbus Municipal Separate School District*, 338 F. Supp. 1376 (N.D. Miss. 1972); *Bray* v. *Lee*, 337 F. Supp. 934 (D. Mass. 1972); *Matter of Patricia A.*, 31 N.Y.3d 83, 335 N.Y.S.2d 33 (1972).

[7] Gunther, *The Supreme Court, 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 34 (1972); Note, *Pregnancy Discharges in the Military: The Air Force Experience*, 86 Harv. L. Rev. 568, 583-88 (1973).

were to be subject to "scrutiny," a word until *Reed* typically reserved for race discrimination cases where the term was accompanied by the requirement that the legislation meet a "compelling state interest" standard. "Traditional" equal protection rulings, by contrast, mandate judicial tolerance of a legislative classification unless "patently arbitrary": "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961). *See also Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970).

On May 14, 1973, in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), this Court made explicit the incurable flaw in governmental schemes that treat males and females differently solely on the basis of gender, schemes that rest upon stereotypical judgments concerning distinct roles for men and women. In *Frontiero*, a statutory presumption that husband is breadwinner, wife dependent, was declared a constitutionally impermissible means of determining entitlement to government benefits. 411 U.S. at 681. Four members of the Court, in a plurality opinion written by Mr. Justice Brennan, declared gender classifications subject to strict judicial scrutiny:

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972). And what differentiates sex from such nonsuspect statuses

> as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or to contribute to society. 411 U.S. at 686.

The 8-1 judgment in *Frontiero* invalidated a fringe benefit scheme that awarded male members of the military housing allowances and medical care for their wives, regardless of dependency, but authorized benefits for female members only if they in fact supported their husbands. The differential at issue in the case at bar is sharper than the one held unconstitutional in *Frontiero*. There, husband qualified if wife supplied more than half his support. Here, under no circumstances may a man qualify for the exemption.

The message of *Frontiero* is clear: persons similarly situated, whether male or female, must be accorded even-handed treatment by the law; lump treatment of men, on the one hand, and women on the other is constitutionally impermissible. Legislative classifications may legitimately take account of need or ability; they may not be premised on sex-role stereotypes or unalterable sex characteristics that bear no necessary relationship to an individual's need, ability or life situation.[8] Recently, the Solicitor General, speaking for the United States and all its agencies, expressed with precision the significance of the *Reed-Frontiero* development (Memorandum for the United States as *Amicus Curiae* at 8, *Cohen* v. *Chesterfield County*

[8] Enlightened judges in state courts take a similar view of gender-based classifications. *See*, e.g., *Sail'er Inn* v. *Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971), a unanimous decision of the California Supreme Court explicitly denominating sex a suspect classification.

School Board and *Cleveland Board of Education* v. *La Fleur*, in U.S.S.C. Nos. 72-777 and 72-1129, filed October, 1973):

> It is now settled that the Equal Protection Clause of the Fourteenth Amendment . . . does not tolerate discrimination on the basis of sex. *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Reed* v. *Reed*, 404 U.S. 71 (1971).[9]

While instances of discrimination against women dominate the growing body of case law, the constitutional mandate is equally applicable to men. For, as *Frontiero* graphically illustrates, gender-based discrimination frequently impacts adversely on both sexes. Laws defining women as a dependent class reinforce societal attitudes that "separate but equal" is a concept appropriately applied to men and women. Women as workers may be denied equal opportunities and fringe benefits because in the world outside the home they are regarded as secondary. As "compensation," women are recognized as

[9] *Accord*, *Smith* v. *City of East Cleveland*, 363 F. Supp. 1131 (N.D. Ohio 1973) (minimum height and weight requirements for municipal police officers discriminate invidiously on the basis of sex); *Healy* v. *Edwards*, 363 F. Supp. 1110 (E.D. La. 1973) (three-judge court), *juris. statement filed*, 42 U.S.L.W. 3307 (Nov. 12, 1973) (exemption of women from jury service held unconstitutional); *Bowen* v. *Hackett*, 361 F. Supp. 854 (D.R.I. 1973) (dependent child allowance must be furnished disabled and unemployed men and women on the same basis); *Ballard* v. *Laird*, 360 F. Supp. 643 (S.D. Calif. 1973) (three-judge court) (Navy must grant commissioned servicemen same tenure legislatively guaranteed to servicewomen); *Aiello* v. *Hanson*, 359 F. Supp. 792 (N.D. Calif. 1973) (three-judge court), *juris. statement filed sub nom. Geduldig* v. *Aiello*, 42 U.S.L.W. 3247 (Oct. 12, 1973) (employees disabled by pregnancy-related condition entitled to compensation from state insurance fund under same terms and conditions as those applicable to all other disabled employees).

principal caretakers of home and children and therefore as financially disabled.

In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), this Court emphasized the fundamental unfairness to men as well as women of legislative lines based on sex stereotypes. Unwed fathers, the Court ruled, may not be deprived of custody absent a hearing of the same quality accorded unwed mothers and wed parents. Acknowledging that "[i]t may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents," this generalization is not true of *all* unwed fathers. 405 U.S. at 654. Consequently, the legislative presumption was impermissible, despite its convenience and its correspondence to reality in perhaps the majority of cases.

Similarly, lower courts have rejected disadvantageous treatment of men unsupported by strong affirmative justification. *E.g., Moritz* v. *Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973) (never-married man declared entitled to parent-care tax deduction provided by Congress for never-married women); *Healy* v. *Edwards*, 363 F. Supp. 1110, 1113-14 (E.D. La. 1973) (three-judge court), *juris. statement filed*, 42 U.S.L.W. 3307 (Nov. 12, 1973) (rejecting jury service exemption for women as inconsistent with "[t]he minimum requirement of Equal Protection" that "dissimilar treatment may no longer constitutionally be provided for men and women who are similarly situated *with respect to the objectives of the legislation*") (emphasis by the court); *Ballard* v. *Laird*, 360 F. Supp. 643 (S.D. Calif. 1973) (three-judge court) (whether the discrimination favors the female or the male is irrelevant in utilizing the teaching of *Frontiero*—cost of granting male officers same

13 year guaranteed tenure as female officers does not justify infringement of the constitutional guarantee); *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972) (16 (male)/18 (female) sex/age differential for juvenile offender treatment discriminates unconstitutionally against men).

Nor does the provision here at issue enjoy special immunity from constitutional scrutiny because tax exemption is a matter of "legislative grace." For it is now beyond debate that "[a] minimum demand of uniformly reasonable rules in the management of public largess is surely an unexceptional requirement of constitutional government." Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1461 (1968); *see Shapiro* v. *Thompson*, 394 U.S. 618, 627 n. 6 (1969).

Two cases, closely analogous to the one at bar, underscore the point: *In re Estate of Legatos*, 1 Cal. App. 3d 657, 91 Cal. Rptr. 910 (1969); *Moritz* v. *Commissioner of Internal Revenue, supra.* In *Estate of Legatos*, the court declared inconsistent with equal protection an inheritance tax imposed on certain property when devised by husband to wife but not when devised by wife to husband:

> Equality of burden is a fundamental principle of taxation. Equal protection demands that similar property be taxed by the same yardstick to those similarly situated. . . . Both in their incidence and innate characteristics tax moneys are sexless and soulless. 1 Cal. App. 3d at 661, 662, 81 Cal. Rptr. at 913.

The court also noted that "[a]dministrative convenience such as preventing loss of revenue to the state is not

a valid basis for classification." 1 Cal. App. 3d at 662, 81 Cal. Rptr. at 913.

In *Moritz*,[10] the Court of Appeals for the Tenth Circuit concluded that a tax classification "premised primarily on sex" constituted an "invidious discrimination." 469 F.2d at 470. In sharp contrast to the Florida Supreme Court's assertion that because "women workers as a class do not earn as much as men" a widows-only tax exemption has a "fair and substantial relation" to a permissible legislative objective, 273 So.2d at 73, the Tenth Circuit reasoned:

> If Congress had desired to give relief to persons in low income brackets . . . means were available through classifications geared to such objectives without using the invidious discrimination based solely on sex. *Cf., Stanley* v. *Illinois*, 405 U.S. 645, 656, 657. 469 F.2d at 470.

In sum, denial to widowers of the property tax exemption granted widows cannot survive constitutional review. Exclusion of widowers, based solely on their sex, reflects arbitrary and stereotypical notions of the differences between women and men, is wholly unrelated to any biological difference between the sexes, and is not fairly and substantially related to individual need.

---

[10] Cited with apparent approval in *Frontiero* v. *Richardson*, 411 U.S. 677, 691 n. 25 (1973).

C. *Gender Classification as a Proxy for Some Other Individual or Social Characteristic, Such as Physical or Economic Capability or Need, Once Regarded as Favorable to or Protective of Women Is Now Recognized as Ultimately Harmful to Them.*

The court below, citing *Hoyt* v. *Florida,* 368 U.S. 57 (1961), concluded that gender classifications are permissible "for the purpose of according a privileged status to women." 273 So.2d at 73 n. 3. In fact, *Hoyt,* is a classic example of the invidious effect of classifications once thought by well-intentioned jurists to operate "benignly" in women's favor. *See* Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective,* 46 N.Y.U.L. Rev. 675, 708-21 (1971).

Hoyt upheld the constitutionality of a Florida statute limiting service of women on juries to volunteers. The limitation was considered reasonable because "woman is still regarded as the center of home and family life." 368 U.S. at 62. Hence, she was entitled to "favored" treatment, indeed, the best of both worlds: the right to serve for the asking, immunity from responsibility if she preferred not to serve.

Decisions in the wake of *Hoyt* demonstrate that favors of this kind come at an exorbitant price.[11] *See* Motion to Affirm, *Edwards* v. *Healy,* U.S.S.C. Docket No. 73-759 (December, 1973). For example, in a 1970 decision, a New York trial court rejected the challenge of a female plaintiff to a jury system with automatic exemption for women. As a

---

[11] *Cf.* S. Grimke, Letters on the Equality of the Seves and the Condition of Women; addressed to Mary Parker, President of the Boston Female Anti-Slavery Society 10 (1838):

> We ask no favors for our sex. All we ask of our brethren is that they take their feet off our necks . . . .

result of this exemption, women constituted less than twenty percent of the available pool. In his published opinion, the judge relied on *Hoyt* to explain to the complainant that she was "in the wrong forum." Accurately reflecting the impact of laws "for women only," the judge stated that plaintiff's "lament" should be addressed to her sisters who prefer "cleaning and cooking, bridge and canasta, the beauty parlor and shopping, to becoming embroiled in plaintiff's problems . . . ." *De Kosenko* v. *Brandt*, 63 Misc.2d 895, 898, 313 N.Y.S.2d 827, 830 (Sup. Ct. 1970). *See also Goldblatt* v. *Board of Education*, 52 Misc.2d 238, 275 N.Y.S.2d 550 (1966), *aff'd*, 57 Misc.2d 1089, 294 N.Y.S.2d 272 (Sup. Ct. 1968) (regulation authorizing full salary less jury fees for male, but not female, teachers was "reasonable" because a woman could avoid jury duty by claiming exemption).

The implications of *Hoyt* were better understood by the three-judge federal district court in *Healy* v. *Edwards*, *supra*. Recognizing that *Reed* had eroded, and *Frontiero* crevassed the foundation of *Hoyt*, the court reasoned:

> When today's vibrant principle is obviously in conflict with yesterday's sterile precedent, trial courts need not follow the outgrown dogma. Hence we consider that *Hoyt* is no longer binding. 363 F. Supp. at 1117.

Other "favors" once accorded women by chivalrous or paternalistic legislatures have undergone similar reassessment. Thus, the indeterminate sentence for women, subjecting them to potentially longer prison terms than men, has been recognized as an invidious classification, despite the favor it bestowed: early release for females who

promptly reformed under the special supervision accorded them. *See U.S. ex rel. Robinson* v. *York,* 281 F. Supp. 8 (D. Conn. 1968); *New Jersey* v. *Chambers,* 36 N.J. 287, 307 A.2d 78 (1973); *Commonwealth* v. *Daniel,* 430 Pa. 642, 243 A.2d 400 (1968); *Commonwealth* v. *Stauffer,* 211 Pa. Super. 113, 251 A.2d 718 (1969); *Liberti* v. *York,* 28 Conn. Supp. 9, 246 A.2d 106 (1968).

In contrast to the assumption of the court below that distinct classification of widows and widowers assists women to achieve equality, administrators and courts charged with implementation of national fair employment policy recognize that special treatment of women perpetuates sex stereotypes and thereby retards women's access to equal opportunity in economic life. Thus, Sex Discrimination Guidelines, 29 C.F.R. §§1604.1-1604.10, issued by the Equal Employment Opportunity Commission pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.,* provide:

> It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees . . . . 29 C.F.R. §1604.9(d).
>
> • • • • •
>
> It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex. 29 C.F.R. §1604.9(f).

These Guidelines, issued in 1972 and applicable to state and municipal employment as well as to the private sector,

reflect consistent administrative and judicial interpretation of Title VII. For example, in 1969, the Equal Employment Opportunity Commission found reasonable cause to believe that Title VII was violated by a death benefit plan providing an automatic pension for widows of male employees, but no pension for widowers of female employees unless physically or mentally incapable of self-support. "Title VII of the Civil Rights Act of 1964," the Commission stated, "is intended to protect *individuals* from the penalizing effects of . . . presumptions based on the collective characteristics of a sexual group." EEOC Decisions, Case No. YNY9-034, CCH Emp. Practices Guide ¶6050 (June 16, 1969). (Emphasis in the original.) For court confirmation of the principle underlying this EEOC decision, *see Rosen* v. *Public Service Elec. & Gas Co.*, 477 F.2d 90 (3rd Cir. 1973) (Title VII violated by pension arrangement allowing women to retire earlier on full pension); *Diaz* v. *Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971) (invalidating a ban on hiring male flight attendants); *Hays* v. *Potlatch Forests, Inc.*, 465 F.2d 1081 (8th Cir. 1972) (reconciling state law with Title VII by extending premium overtime law to men).

The insistence on equal benefits for men and women, husbands and wives, widowers and widows evident in Title VII administration is also a feature of other legislation designed to eradicate sex-based discrimination.[12] For ex-

[12] Similarly, administrators of Executive Orders designed to promote equal employment opportunity target elimination of sex-role stereotypes as the essential task. *See, e.g.*, H.E.W. Higher Education Guidelines, issued pursuant to Executive Order 11246, 3 C.F.R. 418 (1965), as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1968), at 13 (Oct. 1, 1972) (child care leave should be available to men and women on an equal basis).

ample, in December, 1971, Congress amended §2108 of Title 5 of the United States Code "to provide equality of treatment for married women federal employees with respect to (veteran's) preference, eligible employment benefits, cost of living allowances in foreign areas, and regulations concerning marital status generally . . . ." P.L. 92-187, 85 Stat. 644. This legislation, covering all employees of the federal government except members of the uniformed services, added the following subparagraph to 5 U.S.C. §7152:

> (c) Notwithstanding any other provision of law, any provision of law providing a benefit to a male Federal employee or to his spouse or family shall be deemed to provide the same benefit to a female Federal employee or to her spouse or family.

This provision had the following effects: (a) It equalized the tests under 5 U.S.C. §8133 for payment of death benefits to widows and widowers of federal employees dying from injury sustained in the performance of duty. Previously, widows were entitled to benefits if they were "living with or dependent for support on the decedent at the time of his death or living apart for reasonable cause or because of desertion." 5 U.S.C. §8101(6). A widower, however, was entitled to benefits only if, "because of physical or mental disability, [he] was wholly dependent for support on the employee at the time of her death." 5 U.S.C. §8101(11). (b) It equalized the tests under 5 U.S.C. §8110 for payment of augmented compensation to spouses of disabled federal employees. Previously, a wife was eligible for augmented compensation if she lived in the same household as the employee or received regular contributions from

him, or if he was under court order to contribute to her support. A husband was eligible for augmented compensation only if he was wholly dependent on the employee for support because of physical or mental disability.

In January, 1971, Congress amended 5 U.S.C. §8341[13] which defines persons qualified for Federal Civil Service survivor's annuities. A surviving widow qualified automatically, but a surviving widower qualified only if he was incapable of self-support because of mental or physical disability and received more than half his support from his wife. The amendment gave widowers the same automatic qualification as widows. The House Committee Report states the reasons for the amendment:

> In the Committee's judgment, the present provision is discriminatory in that it runs counter to the facts of current-day living, whereby the woman's earnings are significant in supporting the family and maintaining its standards of living. Accordingly, the bill removes the dependency requirements applicable to surviving widowers of female employees, thus according them the same treatment accorded widows of deceased male employees. H.R. Rep. No. 91-1469, 91st Cong., 2d Sess., 1970 U.S. Code Cong. & Ad. News, Vol. III, 5931, 5934.

In December, 1971, Congress amended 5 U.S.C. §2108,[14] which defines persons eligible for veterans preference in the federal civil service. Previously, the "unmarried widow," but not the unmarried widower, of a veteran, and "the

[13] P.L. 91-658, 84 Stat. 1961.

[14] P.L. 92-187, 85 Stat. 644.

wife," but not the husband, of "a service-connected disabled veteran" meeting certain other requirements were eligible. The amendment made widowers and husbands eligible under the same conditions as widows and wives.

In the same act, Congress amended 5 U.S.C. §5924, which provides cost of living allowances to dependents of federal employees living in a foreign area. The allowance, previously payable to "the employee's wife or his dependents, or both," was made payable to "the employee's spouse or dependents, or both."

In October, 1972, Congress amended 38 U.S.C. §102(b) which defines the term "dependent" for the purpose of determining the amount of the education assistance allowance armed forces veterans are eligible to receive.[15] A veteran with dependents, as defined, is eligible for a substantially higher allowance.[16] Section 102(b) previously provided that the wife of a male veteran was automatically classified as a dependent while the husband of a female veteran was classified as dependent only if he "is incapable of self-maintenance and is permanently incapable of self-support due to mental or physical disability . . . ." The amendment redefines "dependent" to include all husbands of eligible female veterans without regard to incapacity or dependency. And on July 9, 1973, 37 U.S.C. §401 was amended to eliminate the differential at issue in *Frontiero*.[17]

---

[15] P.L. 92-540, 86 Stat. 1074.

[16] 38 U.S.C. §1682.

[17] P.L. 93-64, 87 Stat. 147. Although the effective date of the statute is July 1, 1973, the Comptroller General has declared the *Frontiero decision fully retroactive*. 53 Comp. Gen. —— (B 178979, Aug. 31, 1973).

Before amendment, the provisions cited above imposed a test of actual dependency for husbands or widowers, but authorized benefits for wives or widows regardless of dependency. The change in each case was to extend to husbands or widowers the automatic benefits already enjoyed by wives or widows. The "administrative convenience" of prior arrangements was rejected as a justification for differentials in benefits. Rather, the prior arrangements were recognized as "discriminatory" and inconsistent with "the facts of current-day living."

Although aware that "steps have been . . . taken toward the elimination of legal barriers to equality of the sexes," 273 So.2d at 73, the court below found support for its decision in *Gruenwald* v. *Gardner*, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968). *Gruenwald* found no constitutional infirmity in a statutory scheme that accorded women more favorable treatment than men in computing social security benefits upon retirement at age 62.

But if *Hoyt* represents sterile precedent, *Gruenwald* must be regarded as similarly stripped of vitality. *Gruenwald* antedated *Reed*, *Stanley*, and *Frontiero*. When *Gruenwald* was presented to the Second Circuit, that court had as its guide an unbroken line of this Court's decisions sanctioning legislation that drew "a sharp line between the sexes." [18] Post-*Reed*, the Second Circuit promptly signalled its willingness to examine gender classifications from the new perspective. *See Green* v. *Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973). And indicative of height-

[18] *Goesaert* v. *Cleary*, 335 U.S. 464, 466 (1948). *See* cases cited note 2 *supra*.

ened public consciousness of the invidious character of sex-based distinctions, Congress has eliminated the *Gruenwald* differential. The more favorable computation once reserved for women has been extended to men. 42 U.S.C. §414 (Supp. 1972), *amending* 42 U.S.C. §414.

Moreover, the distinction approved in *Gruenwald* had at least a tenuous relationship to discrimination encountered by women in the labor market. The benefit calculation applied to amounts earned by women; it was thus linked in an arguably direct way to disparities in salary and promotion opportunities for male and female wage earners. In the case at bar, on the other hand, the tax exemption is not tied in any way to discrimination encountered by women in economic activity. Totally unrelated to the needs or economic capabilities of widows, it is available on the same terms to the heiress who has never engaged in gainful employment and to the woman who has functioned as her family's sole breadwinner.

In sum, the *noblesse oblige* to "the weaker sex" exhibited by the court below does not aid women to achieve equality[19] and discriminates unfairly against men. In particular, Fla. Stat. §196.191(7) perpetuates the myth that widows cannot, without assistance, make financial ends meet, but widowers can. Far from having any substantial

---

[19] Generalized provisions based on gender stereotypes of the variety here at issue must be distinguished from affirmative action measures tailored narrowly and specifically to rectify the effects of past discrimination against women in a particular setting. Such measures deal directly with economic and social conditions that underlie and support a subordinate status for women. *See, e.g.*, H.E.W. Higher Education Guidelines, *supra* note 12; Galbraith, Kuh and Thurow, *The Galbraith Plan to Promote the Minorities*, N. Y. Times, Aug. 22, 1971 (Magazine) at 9.

relationship to a legitimate state interest, the classification at issue reflects stereotypical attitudes toward the roles of married men and women, hence, the financial status of widowers and widows. One-eyed sex-role thinking of this kind no longer accords with reality for a substantial and growing portion of the population.

II.

Upon determining that the gender-based classification in Fla. Stat. §196.191(7) violates the fourteenth amendment, this Court should remand to the court below for consideration whether, consistent with the dominant legislative purpose, the constitutional infirmity should be remedied by holding the exemption available to all widowed property owners.

Both the trial court and the Supreme Court of Florida acknowledged the obvious point that when the legislature provided an exemption for widows, it intended to benefit females only. In part because women are vastly underrepresented in this Nation's decision-making councils,[20] laws are drafted from a masculine perspective. Ordinarily, absent an express provision to the contrary or something in the subject or context inconsistent with such construction, statutory terms importing the masculine gender apply to females as well.[21] But, with rare exception,[22] words in a statute importing the female gender are subject to

[20] *See Frontiero* v. *Richardson*, 411 U.S. 677, 686 n. 17 (1973).

[21] *Cf.* 1 U.S.C. §1.

[22] *See* P.L. 92-540, 86 Stat. 1092, *amending* 38 U.S.C. §102(b) (wife includes husband, widow includes widower); Fla. Stat. §1.01 (2) ("The masculine includes the feminine and neuter and *vice versa*.") (emphasis added).

grammatical construction—they mean "for women only." Although legislative intent to exclude widowers is thus beyond debate, that intent should supply the starting point, not the terminus, for judicial analysis of the appropriate remedy in this case.

The remedial choice was never addressed by the Florida Supreme Court since it concluded that the "widows only" exemption was constitutional. The trial court, while identifying the constitutional infirmity, failed to perceive the further obligation imposed on a responsible judiciary "to decide whether it more nearly accords with [the legislature's] wishes to eliminate its policy altogether or extend it in order to render what [the legislature] plainly did intend, constitutional." *Welsh* v. *United States*, 398 U.S. 333, 355-56 (1970) (Harlan, J. concurring); *see Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 542-43 (1942). The nature of the necessary inquiry was succinctly described by the Supreme Court of New Jersey:

> . . . The judiciary cannot enlarge the reach of a statute, for this is solely a legislative function. The proposition is obvious enough, and it is equally true that a court may not restrict the scope of a statute. But neither proposition is involved when the question is whether a statute must fall because of a constitutional defect. Rather the question is whether the Legislature would want the statute to survive, and that inquiry cannot turn simply upon whether the statute, if adjusted to the constitutional demand, will cover more or less than its terms purport to cover. Although cases may be found which seem to speak in such mechanical

terms, we think the sounder course is to consider what is involved and to decide from the sense of the situation whether the Legislature would want the statute to succumb. *Schmoll* v. *Creecy*, 54 N.J. 194, 202, 254 A.2d 525, 529-30 (1969).

Similar reasoning is implicitin this Court's judgment in *Frontiero* v. *Richardson, supra*. The *Frontiero* judgment reflects a determination that extension of benefits to spouses of female members of the uniformed services would better serve the legislative purpose than would judicial destruction of the spousal benefit scheme. The same approach, preferring salvage to demoliton, is indicated in diverse decisions of this Court involving state as well as federal laws. *E.g., U.S. Dept. of Agriculture* v. *Moreno*, 41 U.S. L.W. 5105 (U.S. June 25, 1973) (federal food stamps); *Gomez* v. *Perez*, 409 U.S. 535 (1973) (child support under state law); *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973) (state aid to families of working poor); *Richardson* v. *Davis*, 409 U.S. 1069 (1972), *aff'g* 342 F. Supp. 588 (D. Conn. 1972) and *Richardson* v. *Griffin*, 409 U.S. 1069 (1972), *aff'g* 346 F. Supp. 1226 (D. Md. 1972) (social security child benefits); *Weber* v. *Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (state workmen's compensation child benefits); *Graham* v. *Richardson*, 403 U.S. 365 (1971) (state public assistance); *Shapiro* v. *Thompson, supra* (state and District of Columbia public assistance); *Levy* v. *Louisiana*, 391 U.S. 68, *rehearing denied*, 393 U.S. 898 (1968) and *Glona* v. *American Guaranty & Liability Ins. Co.*, 391 U.S. 73, *rehearing denied*, 393 U.S. 898 (1968) (state wrongful death recoveries).

The remedial issue was noted and treated explicitly in *Moritz* v. *Commissioner of Internal Revenue, supra,* a decision of particular relevance to the instant case, for it involved a tax benefit available to never married women, but not to never married men. After determining that discriminatory tax treatment could not be justified by generalizations based on sex stereotypes, the Tenth Circuit further declared:

> [Next], we must determine the effect of the invalidity of provisions denying the deduction to men who have never married. Where a court is compelled to hold such a statutory discrimination invalid, it may consider whether to treat the provision containing the discriminatory underinclusion as generally invalid or whether to extend the coverage of the statute. 469 F.2d at 470.

The Tenth Circuit concluded that extension of the coverage of the deduction provision was "logical and proper," and accordingly ruled that "the benefit of the deduction . . . should be extended to [Moritz]."[23] *Accord, Ballard* v. *Laird, supra* (13 year tenure for women in Navy's commissioned service must be extended to men); *cf. In re Estate of Legatos, supra* (property exempt from tax when devised by wife to husband must also be exempt when devised by husband to wife); *Hays* v. *Potlatch Forests, Inc., supra* (consistent with Title VII's employment discrimination prohibition, premium overtime law by its terms applicable to women only must be applied by employer to men as well as women).

---

[23] The remedial route in *Moritz* was noted by this Court in *Frontiero* v. *Richardson,* 411 U.S. 677, 691 n. 25 (1973).

Nor is the propriety of extension of benefits a recent judicial discovery. As explained by Mr. Justice Brandeis writing for the Court over four decades ago in *Iowa-Des Moines National Bank* v. *Bennett,* 284 U.S. 239, 247 (1931), the legislature eventually may decide to remove the benefit from all, but in the meantime, the Court may prescribe an extension cure. Similar extensions were authorized in *Yale & Towne Mfg. Co.* v. *Travis,* 262 F. 576 (S.D.N.Y. 1919), *aff'd,* 252 U.S. 60 (1920) (tax exemption granted by statute only to state citizens extended to citizens of other states); *Burrow* v. *Kapfhammer,* 284 Ky. 753, 145 S.W. 2d 1067 (1940), *noted in* 54 Harv. L. Rev. 1078 (1941) (exempt class extended to cure unconstitutional exclusion); *Quong Ham Wah Co.* v. *Industrial Accident Comm'n,* 184 Cal. 26, 192 P. 1021 (1920), *appeal dismissed,* 255 U.S. 445 (1921) (workmen's compensation benefits extended to nonresidents to cure constitutional infirmity).

It should be stressed that invalidation of a statutory benefit is an anomalous response to a plaintiff who seeks extension of the benefit to him. Appellant Kahn, like the complainants in *Frontiero* and *Moritz,* does not subscribe to the mutual suffering theory and has no interest in pursuing a claim to withdraw benefits from others. *Cf. Iowa-Des Moines National Bank* v. *Bennett, supra* at 247 (person subjected to discriminatory taxation cannot be expected to seek payment of increased taxes by others). In this light, the trial court's disposition appears illogical and improper. If that court was unable "to decide from the sense of the situation whether the Legislature would want the [widow's exemption] to succumb," [24] it might at least have adopted an

[24] Some indication of legislative preference is provided by Fla. Stat. §61.08 (1972), requiring alimony and child support to be determined in accordance with a sex-neutral standard. Moreover,

intermediate position, declaring the statute unconstitutional as written, but leaving the choice of cures to the legislature. Precisely this middle ground was adopted in *White* v. *Crook*, 251 F. Supp. 401 (M.D. Ala. 1966), where the three-judge federal district court declared unconstitutional Alabama's exclusion of women from jury service, but deferred further relief to permit the legislature to recast the statute.

Indeed, the course taken by the trial court, *i.e.*, nullification of the widow's exemption, collides head-on with Florida's constitutional and statutory stipulations; the extension remedy sought by Appellant Kahn, on the other hand, is consistent with the dominant purpose expressed in the Florida Constitution and statute.[25] Population statistics alone indicate that the judiciary would disserve legislative intent were it to invalidate the exemption: the Florida population aided by the exemption (widows) is four times larger than the population excluded (widowers).[26] Moreover, most of the widowed men in Florida are over

---

the Florida judiciary has clearly indicated that extension is the appropriate remedial route to eliminate legal barriers to equality of the sexes. *Compare Gates* v. *Foley*, 247 So. 2d 40 (Fla. 1971) (extending to wife right to sue for loss of consortium) *with Ellis* v. *Hathaway*, 27 Utah 2d 143, 493 P.2d 985 (1972) (establishing equality between the spouses by forbidding either to sue for loss of consortium).

[25] In *Burrows* v. *Kapfhammer*, 284 Ky. 753, 761-62, 145 S.W.2d 1067, 1072 (1940), the court pointed out that judicial elimination of the statutory exemption there at issue would run directly contrary to "express legislative provision"; extension of the exemption to the excluded class was therefore viewed as the only judicial course consistent with "logic, common sense [and] reason."

[26] In 1970, of males aged 14 years and over, 3.4% were widowers, while 14.0% of the females in the same age group were widows. U.S. Bureau of Census, Census of Population: 1970, Detailed Characteristics, Final Report PC(1)-D11 Florida, October, 1972, at 679-80, noted in Appellees' Motion to Dismiss or Affirm at 4.

65,[27] at or beyond the age when labor force participation terminates with attendant and often drastic reduction in income. Surely the Florida legislature was not so intent on denying the exemption to widowers, a relatively small class of predominantly elderly persons, that it would prefer invalidation of the exemption for the relatively large class of widows to adjustment of the statute to meet the constitutional demand.

CONCLUSION

For the reasons stated above, the decision of the Florida Supreme Court should be reversed, and Florida Statute §196.191(7) should be declared unconstitutional insofar as it differentiates between widowed persons solely on the basis of gender.

On remand, the court below may preserve the express constitutional and statutory stipulations for a widow's exemption by declaring §196.191(7) applicable to all widowed residents.

Respectfully submitted,

RUTH BADER GINSBURG
MELVIN L. WULF
BRENDA FEIGEN FASTEAU
CHRISTINE CASSADAY CURTIS
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

WILLIAM HOPPE
Second Floor, Concord Building
Miami, Florida 33130

Attorneys for Appellants

[27] Approximately 70% of all widowers and 64% of all widows in Florida are over 65. Bureau of Census, *supra* note 26 at 679.